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INTERESTS OF PERSONALITY

I. INTERESTS [1]

A LEGAL system attains its end by recognizing certain interests, — individual, public, and social, — by defining the limits within which these interests shall be recognized legally and given effect through the force of the state, and by endeavoring to secure the interests so recognized within the defined limits. It does not create these interests. There is so much truth in the old theories of natural rights. Undoubtedly the progress of society and the development of government increase the demands which individuals may make, and so increase the number and variety of these interests.[2] But they arise, apart from the law, through

NOTE. The substance of this paper will appear in Chapter IX of a book entitled "Sociological Jurisprudence," now in preparation.

[1] Ritchie, Natural Rights; Spencer, Justice, chs. 9–18; Paulsen, Ethics (Thilly's trans.), 633–637; Green, Principles of Political Obligation, §§ 30–31; Lorimer, Institutes of Law, ch. 7; Demogue, Notions fondamentales du droit privé, 405–443; Ahrens, Cours de droit naturel, 8 ed., II, §§ 43–88; Hegel, Grundlinien der Philosophie des Rechts, §§ 34–104; Fichte, Grundlage des Naturrechts, §§ 18, 19, Erster Anhang, §§ 1–61 (Kroeger's trans., 298–343, 391–469); Beaussire, Les principes du droit, bk. III; Lasson, System der Rechtsphilosophie, §§ 48–56; Boistel, Philosophie du droit, I, §§ 96–241; Kohler, Lehrbuch der Rechtsphilosophie, 91–142; Miraglia, Comparative Legal Philosophy (Lisle's Trans.), bk. II, chs. 1, 2.

[2] "A man's rights multiply as his opportunities and capacities develop. . . . The more civilized the nation, the richer he is in rights." Miraglia, Comparative Legal Philosophy (Lisle's trans.), 324. The idea here is that interests, — that is, demands of the individual, — increase with increasing civilization, and hence the

the competition of individuals with each other, the competition of groups or societies with each other, and the competition of individuals with such groups or societies. The law does not create them, it only recognizes them. Yet it does not have for its sole function to recognize interests which exist independently. It must determine which it will recognize, it must define the extent to which it will give effect to them in view of other interests, — individual, public, or social, — and the possibilities of effective interference by law, and it must devise the means by which they are to be secured. Hence in determining the scope and subject-matter of a legal system we have to consider (1) the interests which it may be asserted the law ought to recognize and to secure; (2) the principles upon which interests are to be selected for such recognition and securing; (3) the principles upon which such interests should be defined and limited for the purposes of legal recognition, or, in other words, the principles upon which conflicting interests should be weighed or balanced in order to determine the extent to which the respective interests are to be given effect; (4) the means by which the law may secure the interests which it recognizes; and (5) the limitations upon effective legal action which preclude complete recognition or complete securing of all these interests to the full extent which ethical considerations might require.

Strictly the concern of the law is with social interests, since it is the social interest in securing the individual interest that must determine the law to secure it. But using interest to mean a claim which a human being or a group of human beings may make, it is convenient to speak of individual interests, public interests, — that is, interests of the state as a juristic person, — and social interests, — that is, interests of the community at large. This is the order in which they have been recognized in the development of juristic thought.

Although certain great social interests have determined the growth of law from the beginning, individual interests were the first to be worked out critically. The social interest in general security required that these interests be provided for in order to prevent self-redress and private war. For nearly three centuries

pressure upon the law to meet these interests increases the scope and character of legal rights.

now, philosophical jurisprudence has devoted itself to this task. The more important of them have become well known to us under the name of natural rights. Usually they have been deduced from the qualities of man in the abstract or from some formula of right or justice. But the practice of jurists has often been sounder than their theories have been. So far as individual interests go, the sociological jurist has little to do beyond essaying to supply a better theoretical foundation.

With respect to public interests, the situation is very different. These were first thought of as individual interests of the personal sovereign and hence were worked out originally in jurisprudence on the analogy of individual interests. Moreover, since the sovereign is, as it were, the guardian of social interests,[3] these also were at first treated as individual interests of the sovereign and worked out on the same analogy of private rights. Hence there is much confused thinking in jurisprudence at this point. General social interests and interests of the state as a juristic person are not differentiated, and both are spoken of as "rights" of the state. The persistence in American public law of the royal prerogative of dishonesty, and the resistance of American lawyers to attempts to introduce ideas on this subject which are familiar to the rest of the world, afford but another instance of the practical effect of theoretical confusion in retarding the growth of the law.

Turning to social interests, the sociological jurist has in a sense a clear field. As such we have only begun to recognize them. Yet the social interest in general security was the first interest secured by the law. It is not too much to say that law came into being to secure this interest. Unhappily, in the nineteenth century legal history was written from an individualist standpoint and was interpreted as a development of restrictions on individual aggression in the interest of individual freedom of action. When

[3] At common law the king was *parens patriæ*, that is, he was guardian of social interests of all kinds and hence his courts of law and equity had a general superintendence of all manner of matters where social interests might be jeopardized. Coke, Second Institute, 199; Blackstone, Commentaries, II, 427, III, 110, 112, 362; Attorney-General *v.* Newman, 1 Ch. Cas. 157 (1735); Attorney-General *v.* Richards, 2 Anstr. 603, 606 (1794). As the king enforced the duties imposed to secure these interests, the common-law lawyer naturally thinks here of rights of the state. See Pollock, First Book of Jurisprudence, 3 ed., 64–65.

we recognize that this was a mistake and that the social interest in general security dictated the very beginnings of law, so that individual rights were only a means gradually worked out for furthering this social interest, and rewrite our legal histories accordingly, we shall be able to make historical jurisprudence more effective.[4] In the same way much that has been written as to individual natural rights, when recast from the standpoint of a social interest in security of acquisitions, may be made useful. But the jurist cannot work alone at this task. In order to construct a scheme of social interests that will serve the jurisprudence of tomorrow as the thoroughly elaborated schemes of natural rights served the jurisprudence of yesterday, the social sciences must coöperate. This does not mean that any jurist shall take all the social sciences for his province. It does mean, however, that he shall know that they all have materials for him and shall be willing and able to go to them therefor.

2. Individual Interests [5]

Individual interests which it is conceived the law ought to secure are usually called "natural rights" because they are not the creatures of the state and it is held that the pressure of these interests has brought about the state. In the stage of equity or natural law, when what ought to be law is made the test of what is, it is natural to confuse the interests which the law does secure, the interests it ought to secure, and the means of securing them under the one name of "rights." Those which are secured and the means whereby they are secured are called legal rights; those which ought to be secured are called natural rights. The usual mode of proceeding has been to deduce natural rights from a supposed social compact or from the qualities of man in the abstract or from some formula of right or justice. The first was abandoned after Kant. With respect to the second, Wundt has said justly:

[4] Although he confuses the sociological conception of law with the conception of the historical school, Mr. Abbot's critique of sociological jurisprudence assumes the conventional interpretation of legal history. Justice and the Modern Law, 8–13. When some historian writes the history of juristic and judicial lawmaking viewed as social functions, it will be easy to vouch history for the other side. See my paper, Legislation as a Social Function, 18 American Journal of Sociology 755.

[5] Brown, The Underlying Principles of Modern Legislation, chs. 7–8; Abbot, Justice and the Modern Law, ch. 1; Spencer, Justice, chs. 9–18. See also n. 1, p. 343.

"Man *in abstracto*, as assumed by philosophies of law, has never actually existed at any point in time or space." [6]

With respect to the third, we may note that, as such formulas of right and justice in the nineteenth century were individualistic, we got in this way a scheme of fundamental individual rights, — that is, individual interests which the law ought to secure, — above and beyond the reach of the state, which it was conceived the state could and must secure, but from which it was conceived the state could not derogate. The same conception was reached, indeed, by the second mode of treatment, that is, by deduction from the qualities of man in the abstract, because man in the abstract was conceived of as the individual man and not as the social man. Anglo-American juristic thinking has been especially insistent upon this conception of fundamental individual rights which, as natural rights, are quite above and beyond the reach of the state and to which social interests must yield.[7]

While it is true that the law recognizes individual interests but does not create them, it is quite as untrue that the law exists primarily in order to secure them or that state and law result simply from the pressure of such interests. As social institutions, state and law exist for social ends, and from the beginning have recognized and secured individual interests as a means thereto.

"The moral criterion by which to try social institutions and political measures may be summed up as follows: The test is whether a given custom or law sets free individual capacities in such a way as to make them available for the development of the general happiness or the common good. The formula states the test with the emphasis falling upon the side of the individual. It may be stated from the side of associated life, as follows: The test is whether the general, the public, organization and order, are promoted in such a way as to equalize opportunity for all." [8]

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[6] Ethics (trans. by Titchener and others), III, 160.

[7] Blackstone, Commentaries, I, 129 ff., especially 139; Calder *v.* Bull, 3 Dall. (U. S.) 386 (1798); Fletcher *v.* Peck, 6 Cranch (U. S.) 87 (1810); Loan Association *v.* Topeka, 20 Wall. (U. S.) 655, 662 (1874); Butchers' Union, etc. Co. *v.* Crescent City, etc. Co., 111 U. S. 746, 762 (1884); Chicago, B. & Q. R. Co. *v.* Chicago, 166 U. S. 226, 237 (1897); Wynhamer *v.* People, 13 N. Y. 378, 387 (1856); Matter of Jacobs, 98 N. Y. 98 (1885); People *v.* Marcus, 185 N. Y. 257 (1906); Beal *v.* Chase, 31 Mich. 491 (1875); *In re* House Bill 203, 21 Col. 27, 39 Pac. 431 (1895); Braceville Coal Co. *v.* People, 147 Ill. 66, 35 N. E. 62 (1893). See Berolzheimer, System der Rechts- und Wirtschaftsphilosophie, II, 160.

[8] Dewey and Tufts, Ethics, 482–483.

It is important to remember that the progress of civilization has given rise to many of these individual interests and that the growth of law has made men conscious of them. For the growth of law and the growth of consciousness of individual interests have gone on together. Recognition of such interests is relatively late in the development of law. The first interests to be recognized are group interests. With economic development, individual interests gradually arise out of these and come to be recognized. In the Roman law, recognition of the individual human being as the subject of rights, or, in other words, as having individual interests which the law should secure, is a doctrine of the *ius naturale*.[9] But even the Roman law of the classical period did not recognize private rights in the sense of our eighteenth- and nineteenth-century jurisprudence. This is especially true of the interest of substance or, as it is called, the natural right of property.[10]

In speaking of the administration of law by the British in India, Maine says:

"If I had to state what for the moment is the greatest change which has come over the people of India . . . I should say it was the growth on all sides of the sense of individual legal right; of a right, not for the total group, but for the particular member of it grieved, who has become conscious that he may call in the arm of the state to force his neighbors to obey the ascertainable rule." [11]

Again, in speaking of the breaking up of village communities in India, he says:

"The probability, however, is that the causes have had their operation much hastened by the English, but have not been created by them. The sense of personal right, growing everywhere into greater strength, and the ambition which points to wider spheres of action than can be found within the community are both destructive of the authority of its internal rules." [12]

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[9] Dig. L, 17, 32; XXVIII, 1, 20, § 7; XXVIII, 8, 1; XLVIII, 10, 7.

[10] Compare, for example, the ideas as to freedom of testamentary disposition in eighteenth- and nineteenth-century juristic thinking with the Roman law. Spencer, Justice, § 68; Miller, Philosophy of Law, 311; Miraglia, Comparative Legal Philosophy (Lisle's trans.), § 510; Beaussire, Les principes du droit, 265–271; Boistel, Philosophie du droit, I, § 270. See also Hegel, Grundlinien der Philosophie des Rechts, § 180 (Dyde's trans., 184).

[11] Village Communities, 7 ed., 73.

[12] *Id.*, 112.

Accordingly he tells us that partition of inheritances is demanded to-day everywhere in India and that:

"the brethren of some one family are always wishing to have their shares separately." [13]

What Maine saw going on in India in his time, legal history shows us has gone on in all systems.[14] Up to the end of the eighteenth century the whole course of development of the law had been to disentangle individual interests from group interests and to protect and secure these individual interests by legal rights.

We may say, then, that the law slowly worked out a conception of private rights as distinguished from group rights. This culminated in the eighteenth century in a working out of individual interests as distinguished from public interests, to which our bills of rights, in which the natural rights of the individual are solemnly asserted against the state, still bear witness.[15] Next the law began to work out social interests as such and to endeavor to reach a balance between individual interests and social interests. But there is a social interest in the individual moral and social life. In securing individual interests to this end, the law is securing a social interest. Therefore the problem ultimately is not to balance individual interests and social interests, but to balance this social interest with other social interests and to weigh how far securing this or that individual interest is a suitable means of achieving the result which such a balancing demands.

Individual interests may be classified as (*a*) interests of personality, — the individual physical and spiritual existence; (*b*) domestic interests, — "the expanded individual life;" [16] and (*c*) interests of substance, — the individual economic life.

All classifications are more or less arbitrary, and the foregoing also may seem to be of that character. For instance, defamation infringes both personality and substance, since one's reputation is an asset as well as a part of his personality. Indeed Spencer, in his discussion of natural rights, includes reputation under incorporeal property.[17] Again, malicious prosecution of a civil

[13] Village Communities, 7 ed., 113.

[14] See *post*, p. 356.

[15] See Declaration of Rights of Virginia (1776), art. 1; Déclaration des droits de l'homme et du citoyen (1789), art. 2; Déclaration des droits de l'homme et du citoyen (1793), art. 1.

[16] Paulsen, Ethics (Thilly's trans.), 634.

[17] Justice, § 62.

action may infringe both personality and substance. Again, the common-law action for seduction is in form based on an injury to substance, not on an injury to a domestic interest. In fact, in the common-law system, injuries to domestic relations generally are in form viewed as infringements of interests of substance. But this is due to historical reasons. Along with so many other anomalies of our law, it arose from the exigencies of the action on the case, which was the only available remedy at common law. In consequence not only is this mode of viewing such injuries unjustifiable analytically, but it is largely disappearing in the modern law of torts. With the general development of law the lines between these interests are clearing and it is becoming apparent that the remedy must be applied with reference not to the act, but to the exact interest or interests which that act infringes.

Many German jurists put domestic interests under interests of personality.[18] Some of them put all individual interests in the first group,—that is, they regard all individual interests as interests of personality.[19] The threefold distinction suggested above was made by Kant. He distinguished natural rights as (*a*) personal, that is, involving the physical person; (*b*) personal but real in kind, that is, having a certain relation to substance also; and (*c*) real, that is, involving the relations of individuals to things.[20] Hegel criticizes this classification, arguing that all individual interests are interests of personality because, as he holds, all natural rights flow from the principle of respect for the free will of others.[21] The central position of the free will in all legal philosophy in the nineteenth century led to a general acceptance of this view, and the indirect influence of the socialist jurists in Europe, who object to individual interests of substance, has kept it alive in the attempt to include as much as possible in what is taken to be an unimpeachable interest of personality. In the best recent discussion of the matter Adler prefers to confine the interest of personality to the physical person and the so-called spiritual person.[22]

[18] *E. g.*, Lasson, System der Rechtsphilosophie, § 48, par. 6.

[19] Gareis, Science of Law (Kocourek's trans.), 122–135; Gierke, Deutsches Privatrecht, I, 702.

[20] Metaphysische Anfangsgründe der Rechtslehre, §§ 11, 18, 24.

[21] Grundlinien der Philosophie des Rechts, § 40, n.

[22] Die Persönlichkeitsrechte im allgemeinen bürgerlichen Gesetzbuch, Festschrift zur Jahrhundertsfeier des allgemeinen bürgerlichen Gesetzbuches, 165.

3. PERSONALITY [23]

How shall we arrive at the interests of personality which the law ought to secure? To put it as the question would have been put formerly, How shall we construct a scheme of natural rights of personality? It has been said that the usual method has been to deduce them from the qualities of man in the abstract or from some supposed formula of right and justice. The latter was the method of the nineteenth century. A sketch of what may be taken as a fair example of a nineteenth-century scheme of natural rights will illustrate this method. The scheme in question is to be found in Spencer's Justice. Although it purports to be based upon principles of evolution, it starts from what is essentially Kant's formula of right, taken as a formula of justice,[24] and from this formula deduces seven rights.[25] Each right is then confirmed by seeking to show that in the evolution of society and of law it has been recognized in continually increasing measure, and that the tendency is to recognize it to the full extent of the principle reached by deduction. Although the terminology is positivist, the mode of procedure is in substance a combination of the metaphysical and the historical methods as theretofore employed. First the right is deduced from the principle. The scheme of rights is shown to be a logical development of the formula of justice. Then it is shown that the rights recognized among civilized peoples represent an unfolding of the same principle in the same way in human experience. Considering simply the philosophical side, the scheme of seven natural rights is as follows:

(1) The right to physical integrity. Spencer deduces this from his definition of justice in this way: If the actions of one person are carried so far as directly to inflict physical injury upon another, they go beyond the limitation of his liberty by the like

[23] Gareis, Science of Law (Kocourek's trans.), 122–135; Adler, Die Persönlichkeitsrechte im allgemeinen bürgerlichen Gesetzbuch, Festschrift zur Jahrhundertsfeier des allgemeinen bürgerlichen Gesetzbuches; Geyer, Geschichte und System der Rechtsphilosophie, 137–142; Stahl, Philosophie des Rechts, 5 ed., 312–350.

[24] See Maitland, Collected Essays, II, 274–284; Spencer, Justice, app. A.

[25] Spencer, Justice, chs. 9–18. I have abridged the scheme somewhat by putting the ten rights which Spencer enumerates into seven, without, however, altering the substance, as he himself states that some of the rights he discusses are but phases of others.

liberties of all; they are, therefore, unjust and may be the subject of legal interference. It should be noted that in his view this interference with the individual has to be justified because it is interference with a fundamental natural right. It is held to be justified in this case by consideration of the like natural rights of other individuals. In this way Spencer deduces the natural right of each individual to have his physical integrity respected by his fellows.

(2) The right to free motion and locomotion, or, as it is usually called by writers on the common law, the right of personal liberty. Here, it is said, an obvious deduction from the formula of justice, — "the liberty of each limited only by the like liberties of all," — requires that each individual be at liberty to make free use of his limbs and to move about freely from place to place, except as by such conduct he interferes with like action on the part of his fellow men or with some other natural right of his fellow men.

(3) The right to the use of natural media. This is deduced as follows: If one individual interferes with the relations of another to the physical environment upon which the latter's life depends, he infringes the like liberties of others by which his own are measured. This so-called natural right to the use of natural media is a curious example of the extreme individualism of nineteenth-century philosophical jurisprudence. It is true that in all systems of law some things are held to be incapable of ownership by individuals. It is usually said of such things in the law books that they are "common to all mankind" and that their appropriation by individuals is forbidden by natural law. Thus, the Institutes of Justinian say:

"By the law of nature . . . the following things are common to all men: air, running water, the sea, and consequently the shore of the sea." [26]

Again, an eighteenth-century writer says:

"Some things are by nature incapable of appropriation, so that they cannot be brought under the power of any one. These got the name of *res communes* by the Roman law and were defined things the property of which belongs to no person but the use to all. Thus the light, the air, running water, and so forth are so adapted to the common use

[26] Inst. II, 1, § 1

of mankind that no individual can acquire a property in them or deprive others of their use." [27]

It will be observed that down to the nineteenth century, jurists had said that natural law decreed a common interest in natural media and forbade any separate individual interest. Here, however, we find a philosopher in the nineteenth century insisting on an individual natural right to the use of these media which precludes individual ownership. It is interesting to note that recently a third doctrine has grown up, namely, that there is a public interest in these natural media so that they are not *res communes* but *res publicæ*.[28] Perhaps nothing could illustrate more clearly the purely personal character of all such schemes of natural rights.[29]

(4) The right of property. The mode in which this is deduced must be considered more fully elsewhere.[30] Under this right

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[27] Erskine, Institute of the Law of Scotland, I, 146.

[28] See the statutes in Wiel, Water Rights, 3 ed., I, §§ 6, 120; *Ex parte* Bailey, 155 Cal. 472, 101 Pac. 401 (1909); Geer *v.* Connecticut, 161 U. S. 519 (1896).

[29] Thus: "No court would hesitate to declare void a statute which enacted that A. and B., who were husband and wife to each other, should be so no longer, but that A. should thereafter be the husband of C. and B. the wife of D." Miller, J., in Loan Ass'n *v.* Topeka, 20 Wall. 655, 662 (1874). But Lord Holt, who agreed that there are limitations on legislative authority imposed by natural law says that parliament "may make the wife of A. to be the wife of B." City of London *v.* Wood, 12 Mod. 669 (1692). Mr. Justice Miller wrote when legislative divorce had become obsolete almost everywhere. In Lord Holt's time a divorce *a vinculo* could be had only in parliament. See also the statement of Curtis, J., in Scott *v.* Sandford, 19 How. (U. S.) 393, 626 (1856), that "all writers" agree that slavery "is created only by municipal law." But Aristotle (Politics, bk. I, ch. 5), Grotius (II, 5, 27, § 2 and 29, § 2), and Rutherforth (Natural Law, bk. I, ch. 20, § 4), who are not insignificant authorities, argue that slavery has a natural basis in some cases beyond and apart from law. Again, in Wynhamer *v.* People, *supra*, 454, Hubbard, J., said: "Liquor is not a nuisance *per se, nor can it be made so by a simple legislative declaration.*" Since that time people have changed their minds, and we find another judge saying: "The entire scheme of prohibition as embodied in the Constitution and laws of Kansas might fail, if the right of each citizen to manufacture intoxicating liquors for his own use or as a beverage were recognized. *Such a right does not inhere in citizenship.*" Harlan, J., in Mugler *v.* Kansas, 123 U. S. 623 (1887).

"We think that, aside from the positive law, there exist only the opinions of authors, which respond more or less to the needs of society." Antoine, Introduction to Fiore, Nouveau droit international public, ii. *Cf.* Bentham, Principles of Morals and Legislation, 17, n. 1.

[30] See Ely, Property and Contract in their Relation to the Distribution of Wealth, ch. 22.

Spencer includes (*a*) tangible or corporeal property; (*b*) incorporeal property, under which, curiously enough, he includes reputation as the result of a man's good conduct, along with patent and copyright; and (*c*) the right of gift and bequest, which he regards as consequences of complete ownership. The inclusion of reputation under incorporeal property appears to illustrate the effect of propinquity upon philosophical ideas. For it must be admitted that for many purposes English law does base its law of defamation on an interest of substance rather than on an interest of personality. The basis of the "right of bequest" or testamentary disposition must also be considered more fully elsewhere.[31]

(5) The right of free exchange and free contract. This is deduced as a sort of freedom of economic motion and locomotion in the same manner as the right of physical motion and locomotion.

(6) The right of free industry. This is said to be a modern outgrowth of the right of free motion and locomotion, being, as it were, a right of economic motion and locomotion.

(7) The right of free belief and opinion. This also is said to be a modern development of the right of free motion and locomotion. It is deduced as a right of free mental motion, a right of exercising complete freedom in one's mental movements so far as like freedom on the part of others is not affected thereby. Two phases of this right are treated as two separate rights, namely, freedom of religious belief and opinion and freedom of political belief and opinion.

If we reject the mode of determining individual natural rights illustrated by the foregoing scheme, as I think we must, how are we to define the individual interests which the law ought to secure? The pragmatist would answer that we should take for our starting point the proposition of William James which I have discussed elsewhere in this connection,[32] namely, that all demands which the individual may make are to be met so far as they are not outweighed by other demands of (*a*) other individuals, (*b*) the organized public, (*c*) society. The principles by which we are to

[31] See Ely, Property and Contract in their Relation to the Distribution of Wealth, ch. 17.

[32] The Philosophy of Law in America, Archiv für Rechts- und Wirthschaftsphilosophie, VII, 213; Legislation as a Social Function, 18 American Journal of Sociology 755.

determine how far they are so outweighed must be considered elsewhere.[33] Some have preferred to say that all "reasonable demands" are to be met so far as possible.[34] Reason requires limitation of the demands of each with reference to those of others and of all, and sometimes, it may be, limitation of the demands of society with reference to those of individuals. But why? Because all cannot be satisfied. If our aim is to satisfy all so far as we can, then reason is employed in the selection of those which we will satisfy and of the limits within which we shall satisfy them. Accordingly the first task is simply to ascertain what demands the individual conceivably may make as incident to personality. It will be convenient to take these up under three heads, namely, the physical person, honor (reputation), and belief and opinion.

4. The Physical Person[35]

Inviolability of the physical person is universally put first among the demands which the individual may make. This interest, called by Paulsen the interest in body and life,[36] includes the so-called natural rights of physical integrity and of personal liberty or, as Spencer styles it, free motion and locomotion. Passing for the moment all consideration of the limits within which this interest must be confined when recognized, three questions may be taken up: (1) What is the extent of the interest as an individual interest; that is, what may the individual demand in this connection which, therefore, the law is to secure so far as may be? (2) How far has this interest been recognized by legal systems in the past and how has legal recognition of this interest developed? (3) How far is this interest protected by law to-day?

We may conceive the interest in the physical person as cover-

[33] See my paper, Legislation as a Social Function, 18 American Journal of Sociology 755.

[34] Centralization and the Law, 154. See Willoughby, Social Justice, 20 ff.

[35] Green, Principles of Political Obligation, §§ 148–151; Wigmore, Summary of the Principles of Torts (Cases on Torts, II, app. A), §§ 12–26; Miller, Philosophy of Law, lect. XI; Amos, Systematic view of the Science of Jurisprudence, 287–297; Post, Ethnologische Jurisprudenz, II, § 102; Blackstone, Commentaries, II, 119–138. I am indebted to Professor E. R. Thayer for assistance and for many suggestions in connection with this section.

[36] Ethics (Thilly's trans.), 633.

ing five points. The first and most obvious is immunity of the body from direct or indirect injury. Second and closely related is the preservation and furtherance of bodily health. Third and hardly less important is immunity of the will from coercion, freedom of choice, and judgment as to what one will do. These three interests have long been recognized. Two more have become important with the progress of civilization, namely, immunity of the mind and the nervous system from direct or indirect injury and the preservation and furtherance of mental health,—freedom from annoyance which interferes with mental poise and comfort. Perhaps it may be objected that we have no warrant for thus distinguishing mental health and the security of the nervous system from bodily health and the security of bone and muscle. But history and certain practical considerations require that these be considered apart, whatever a stricter abstract adherence to biological science might otherwise dictate.[37]

Injuries to the body are the first wrongs dealt with in the history of law. But they are not thought of at first as infringements of an individual interest. Rather they are thought of as involving infringement of an interest of a group or kindred or of a social interest in peace and good order. They are taken to involve affront to the kindred whose kinsman is assailed, or it is taken that a desire for revenge will be awakened, and hence that they involve danger of private vengeance and private war.[38] It is not an individual interest which is regarded, but a group interest. Hence the remedy (composition) is imposed to secure the social interest in peace and order, not to vindicate an individual private right. Often in primitive law a composition is payable to the kindred as well as to the person injured. Likewise in case of killing, the *wer* is payable to the kindred, not to dependents; it is exacted to satisfy vengeance for an insult to the kindred, not to compensate those who are deprived of support.[39] At first, then, the ideas are (1) a group interest against insult and (2) a social interest against disorder, rather than an individual interest in the physical person.

[37] On the other hand, for like reasons, the common law deals with nervous injuries which leave no physical signs and mental injury without much discrimination. Spade *v.* Railroad Co., 168 Mass. 285, 47 N. E. 88 (1897).

[38] The latter idea is perhaps still behind the common law of libel as a misdemeanor. Blackstone, Commentaries, IV, 150.

[39] See Amira, Grundriss des germanischen Rechts, § 54.

Out of these evolves slowly the idea of an individual interest secured by an individual right.

Again, when the individual interest is recognized, it is regarded at first as an interest in one's honor, in one's standing among brave men regardful of their honor, rather than as an interest in the integrity of the physical person. In Greek law every infringement of the personality of another is ὕβρις (*contumelia*); the injury to honor, the insult, being the essential point, not the injury to the body.[40] In Roman law, injury to the person is called *iniuria*, meaning originally insult, but coming to mean any willful disregard of another's personality.[41] In consequence the beginnings of law measure composition not by the extent of the injury to the body, but by the extent of the injury to honor and the extent of the desire for vengeance thus aroused,[42] since the interest secured is really the social interest in preserving the peace.

While the law secures the interest of the individual in his honor at least as soon as his interest in his physical person, when presently it distinguishes between injuries to the person and injuries to honor or reputation, it moves very slowly in protecting feelings in any respect other than against insult or dishonor. Three steps may be noted. At first only physical injury is considered. Later overcoming the will is held a legal wrong; in other words, an individual interest in free exercise of the will is recognized and secured. Finally the law begins to take account of purely subjective mental injuries to a certain extent and even to regard infringement of another's sensibilities.

With respect to the interest in free exercise of the will, the Roman law of the stage of strict law (*ius civile*) and the common law agreed in holding transactions entered into under duress to be legally binding.[43] In each system in the stage of infusion of morals into law, equity intervened to set aside legal transactions resulting from coercion. Roman law went further. On equitable grounds it worked out a special wrong (*metus*) of unlawfully overcoming another's will and developed an action for reparation of

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[40] Hermann, Lehrbuch der griechischen Rechtsaltertümer, 4 ed., § 6.

[41] Gaius, III, §§ 220–222; Inst. IV, 4; Dig. XLVII, 10, 16.

[42] See my paper, The End of Law as Developed in Legal Rules and Doctrines, 27 HARV. L. REV. 195, 198.

[43] *Id.*, 204.

the injury resulting therefrom.[44] The common law did not recognize a tort of duress as such, not even to the extent of allowing recovery by way of reparation for what one did through coercion as an incident of recovery for the physical injury with which it was connected. But recovery by way of restitution came to be allowed on equitable principles as upon quasi-contract in order to prevent unjust enrichment.[45] The law on this point grew slowly. In the Roman and the modern Roman law it seems to have passed through four stages. In the first three stages there is a purely objective standard. The law does not ask whether this man's will was in fact overcome by wrongful pressure brought to bear upon him in this case, but asks instead what was the character of the pressure employed. In the first stage the objective standard made use of is peril of life or limb, — actual or threatened bodily suffering. Any pressure short of that is not regarded.[46] In the second stage there is still an objective test, but it is more liberal. The law asks whether the will of a reasonable or standard man would have been overcome by the pressure employed.[47] In the third stage there is a further liberalizing of the objective standard. The law asks whether the evil threatened was a serious one or, as some civilians put it, whether the complainant yielded to fear of "a not-inconsiderable evil." [48] Finally the new German code adopts a purely subjective standard, asking only, Did the unlawful pressure employed in this case actually overcome the will? [49] It is required that the pressure be unlawful because if,

[44] Dig. IV, 2, 1; IV, 2, 14, §§ 3, 5; IV, 2, 16, § 2.

[45] Astley *v.* Reynolds, 2 Stra. 915 (1782).

[46] Dig. IV, 2, 2; IV, 2, 3; Code, II, 4, 13. By way of comparison it may be noted that Blackstone so defines duress in our law, laying down that there must be threat of immediate harm to life or limb or else imprisonment. Commentaries, I, 130–131.

[47] Dig. IV. 2, 6.

[48] Dig. IV, 2, 5; Windscheid, Pandekten, I, § 80, n. 6; Dernburg, Pandekten, I, § 91, par. 2; Regelsberger, Pandekten, I, § 144, n. 8.

[49] Civil Code, § 123; Crome, System des deutschen bürgerlichen Rechts, I, 432. It should be noted that Anglo-American law is going through a similar course of development. Blackstone's formula, which is that of the first stage of the Roman law, has been cited *supra*. In the nineteenth century the cases commonly apply the objective test of what is "sufficient to overcome the mind and will of a person of ordinary firmness." Brown *v.* Pierce, 7 Wall. (U. S.) 205 (1868); James *v.* Dalbey, 107 Ia. 463, 78 N. W. 51 (1899); Railroad Co. *v.* Pattison, 41 Ind. 312, 320 (1872); Fellows *v.* School District, 39 Me. 559 (1855); Tapley *v.* Tapley, 10 Minn. 448 (1865); Davis *v.* Railroad Co., 46 Miss. 552, 568 (1872); Edwards *v.* Bowden, 107 N. C.

to secure some other interest, the law recognizes the pressure as legal, then, in a weighing of interests the individual interest in freedom of will may have to give way.[50] As to the main point, it would seem that the subjective standard is the one that ought to be adopted. So far as the objective standard subserves a useful purpose in preventing fraud and so maintaining the social interest in security of transactions, the end may be attained by requiring a proper *quantum* of proof in such cases and by treating considerations of what a reasonable man would do as of evidentiary value. The objective standard is a survival from the extreme individualism of the strict law and its reluctance to set aside acts done in due legal form.

Injury to the nervous system, mental injury, and injury to sensibilities, where there is no physical impact or no injury to substance or to any relation, is a new problem of modern law. Here also development has been slow and cautious, partly because the law on this subject has had to be made in a period of legal stability, but partly also because of practical limitations upon the enforcement of legal rules and hence upon the securing of interests thereby. A nervous derangement manifested objectively is like any bodily illness. But our law does not protect against purely subjective mental suffering except as it accompanies or is incident to some other form of injury and within certain disputed limits.[51] There are obvious difficulties of proof in such

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58, 12 S. E. 58 (1890). But courts frequently define duress in terms of the subjective criterion. Cribbs *v.* Sowle, 87 Mich. 340, 49 N. W. 587 (1891); Phillips *v.* Henry, 160 Pa. St. 24, 28 Atl. 477 (1894); Galusha *v.* Sherman, 105 Wis. 263, 81 N. W. 495 (1900). In actual application the tendency seems to be toward the subjective criterion.

[50] *E. g.*, a threat to sue or to levy execution where one has a right to do so in order to secure an interest of substance, although results disastrous to the debtor would follow. Emmons *v.* Scudder, 115 Mass. 367 (1874). *Cf.* Dig. IV, 2, 3.

[51] "A factor which we may for the sake of convenience refer to as the parasitic element of damage. The idea which is meant to be brought out by the use of this expression is that in certain situations the law permits elements of harm to be considered in assessing the recoverable damage which cannot be taken into account in determining the primary question of liability. It is only under this head that such factors as insult, disgrace, and anguish of feeling can get legal recognition at all." Street, Foundations of Legal Liability, I, 461. A striking instance may be seen in Floyd *v.* Atlantic Coast Line R. Co., 83 S. E. 12 (N. C., 1914), where a mother sued for mental anguish caused by the negligent mutilation of the dead body of her boy. As the right to possession of the body for the purposes of burial was in her husband

cases, so that false testimony as to mental suffering may be adduced easily and is very hard to detect.[52] Hence this individual interest has to be balanced carefully with a social interest against the use of the law to further imposture. For these reasons courts, thinking more of the practical problem of proof than of the logical situation, have looked to see whether there has been some bodily impact or some wrong infringing some other interest, which is objectively demonstrable, and have put nervous injuries which leave no physical record and purely mental injuries in the same category.[53] In case of nervous injury or mental suffering along with other injury as a result of bodily impact, considerations of what would naturally happen to persons of normal sensibilities enable the law to meet the practical difficulties. This is true also where there has been an infringement of some other interest in itself raising a right of action.[54] But if there is no physical impact and there is no independent right of action for a coincident injury, the practical difficulties weigh heavily. The case which best illustrates the problem is one in which fright or nervous shock results in or develops into palpable physical injury. In one type of this case the fright or nervous shock was caused by the defendant's negligence. Attempt has been made to dispose of the question by resorting solely to the principle of remoteness.[55]

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as next of kin, and hence there was no infringement of any interest of the mother other than that involved in the injury to feelings and sensibilities, recovery was denied.

[52] *Cf.* the remarks of the court in Huston *v.* Freemansburg, 212 Pa. St. 548, 61 Atl. 1022 (1905).

[53] Spade *v.* Railroad Co., 168 Mass. 285, 47 N. E. 88 (1897); Dulieu *v.* White, [1901] 2 K. B. 669. But see Yates *v.* South Kirkby Collieries, Ltd., [1910] 2 K. B. 538.

[54] Bouillon *v.* Laclede Gas Light Co., 148 Mo. App. 462, 129 S. W. 401 (1910); Tennessee Cent. R. Co. *v.* Brasher, 97 S. W. 349 (Ky., 1906); Nordgren *v.* Lawrence, 74 Wash. 305, 133 Pac. 436 (1913). "The treatment of any element of damage as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor which is to-day recognized as parasitic will, forsooth, to-morrow be recognized as an independent basis of liability. It is merely a question of social, economic, and industrial needs as those needs are reflected in the organic law." Street, Foundations of Legal Liability, I, 470.

[55] Victorian Railway Com'rs *v.* Coultas, 13 App. Cas. 222 (1888) (no recovery); Green *v.* Shoemaker, 111 Md. 69, 73 Atl. 688 (1909) (recovery allowed). See Wigmore, Summary of the Principles of Torts, § 15. "Do not some courts, in laying down the rule of legal cause, proceed upon the supposition that one problem before them is to determine when to exempt a tortfeasor from liability for effects which were in reality caused by his tort?" Smith, Legal Cause in Actions of Tort, 25 HARV. L. REV. 103. In other words, questions of "legal cause" or "remoteness" are often used

But the better decisions among those which deny recovery proceed frankly upon considerations of what is practicable, that is, upon a balancing of interests.[56] In another type of this case the nervous or mental shock which caused the physical injury was inflicted intentionally. Here the difficulties are less than in the first type and the better judicial view allows recovery.[57] But there are courts that will not go so far and there are limits. If the defendant intended to bring about the physical harm which followed, there would seem no occasion for requiring more.[58] If, however, the defendant did not intend the physical harm, but only a mild fright or mild nervous shock which would work no further harm in a person of ordinary nerves and normal sensibilities, the accepted rule seems to be that there should be no recovery.[59] In cases of negligence the individual interest of the actor, — that is, his interest in the free exercise of his faculties, — must be weighed as well as the social interest against imposture and the practical difficulties of proof and reparation. Where he exercises his facul-

by the courts subconsciously to cover a balancing of other interests against the individual interest.

[56] "As has been explained repeatedly, it is an arbitrary exception, based upon a notion of what is practicable that prevents a recovery for visible illness resulting from nervous shock alone. . . . But when there has been a battery and the nervous shock results from the same wrongful management as the battery, it is at least equally impracticable to go further and to inquire whether the shock comes through the battery or along with it. Even were it otherwise, recognizing as we must the logic in favor of the plaintiff when a remedy is denied because the only immediate wrong was a shock to the nerves, we think that when the reality of the cause is guaranteed by proof of a substantial battery of the person there is no occasion to press further the exception to general rules." Holmes, C. J., in Homans *v.* Boston E. R. Co., 180 Mass. 456, 62 N. E. 737 (1902). In a prior case the same judge said: "The point . . . is not put as a logical deduction from the general principles of liability in tort, but as a limitation of those principles on purely practical grounds." Smith *v.* Postal T. Co., 174 Mass. 576, 55 N. E. 380 (1899). *Cf.* also Driscoll *v.* Gaffey, 207 Mass. 102, 92 N. E. 1010 (1910). But see Green *v.* Shoemaker, *supra*, where the court denies that these practical considerations are sufficient to preclude recovery where physical injury has resulted from fright, though it says no action will lie for mere fright which does not result in a physical injury.

[57] Wilkinson *v.* Downton, [1897] 2 Q. B. 57; Garrison *v.* Sun Pub. Co., 207 N. Y. 1, 100 N. E. 430 (1912). But see Stevens *v.* Steadman, 140 Ga. 680, 79 S. E. 564 (1913).

[58] See remarks of Holmes, C. J., in Silsbee *v.* Webber, 171 Mass. 378, 380, 50 N. E. 555, 556 (1898).

[59] Nelson *v.* Crawford, 122 Mich. 466, 81 N. W. 335 (1899). See Bohlen, Right to Recover for Injury Resulting from Negligence without Impact, 41 Amer. L. Reg. 141.

ties for purposes recognized by law and, so far as he could reasonably foresee, does nothing that would work an injury, the individual interest of the unduly sensitive or abnormally nervous must give way. But the law does not secure individuals in the free exercise of their faculties for the purpose of injuring others, since obvious social interests are opposed to such a claim. Hence, if there was an intention to injure, only the social interest against imposture and the practical difficulties are to be weighed. This is the philosophical basis of the distinction made in these cases. Probably advance in our knowledge of psychology and mental pathology and progress in means of arriving at the truth in matters where expert evidence is required will determine the development of the law upon this subject. So long as the margin for imposture and the scope of pure expert conjecture remain as large as they are at present, this phase of the interest of personality must remain in some measure insufficiently secured.

Where the injury is to mental comfort only, the practical difficulties are still greater. Hence the law can recognize an "interest in the peace and comfort of one's thoughts and emotions" [60] only to a limited extent. In the first place, an objective standard is required here by the social interest with which the individual interest must be balanced. Hence the tendency of the law to secure an interest in mental comfort only to the extent of ordinary sensibilities of ordinary men, and then only when the mental suffering is caused by and involved in the infringement of some other interest.[61] In other words, here again the law does not secure the whole demand which the individual may make, but it does secure the interest in case of ordinary sensibilities where there is also an objective injury. Thus, no doubt, it secures the interest in the general run of cases for the average man. No more may well be attempted with our present means of proof and in view of the inapplicability to such injuries of the means of redress known to our law.

Another phase of the same interest is the demand which the individual may make that his private personal affairs shall not be laid bare to the world and be discussed by strangers. Such an interest is the basis of the disputed legal right of privacy.[62] It is

[60] Wigmore, Summary of the Principles of Torts, § 19. [61] *Id.*, § 20.
[62] Warren and Brandeis, The Right to Privacy, 4 HARV. L. REV. 193.

a modern demand, growing out of the conditions of life in the crowded communities of to-day, and presents difficult problems. The interest is clear. Such publicity with respect to private matters of purely personal concern is an injury to personality. It impairs the mental peace and comfort of the individual and may produce suffering much more acute than that produced by a mere bodily injury. But, as the injury is mental and subjective, the difficulties already considered must, at least, confine legal securing of the interest to ordinary sensibilities. Here, as in many other cases, in a weighing of interests the over-sensitive must give way. For over and above the difficulties in mode of proof and in applying legal redress, social interests in free speech and dissemination of news have also to be considered. On such grounds, no doubt, a legal right of privacy which fully secures this interest has not been recognized anywhere.[63] For the most part the interest has been secured incidentally, as it were, by taking account of infringement thereof as an element of damage where well-recognized legal rights have also been violated, rather than by establishing a legal right of privacy a violation whereof should constitute a cause of action. But while the law is slow in recognizing this interest as something to be secured in and of itself, it would seem that the aggressions of a type of unscrupulous journalism, the invasions of privacy by reporters in competition for a "story," the activities of photographers, and the temptation to advertisers to sacrifice private feelings to their individual gain call upon the law to do more in the attempt to secure this interest than merely take incidental account of infringements of it.[64] A man's feelings are as much a part of his personality as his

[63] See Wigmore, Summary of the Principles of Torts, § 149.

[64] "John S. Geraghty, *father* of John Edward Paul Geraghty, who on Tuesday eloped with Miss Julia French, to-day asked the police to save him from camera men. . . . Geraghty told the police that he was followed everywhere by men with cameras who were trying to take the picture of himself and his cab. He said he had been driven about crazy by them and that his wife and children were being hounded in a similar way. Mr. Geraghty was very angry this afternoon and he loaded up the front seat of his cab with several large stones which, he said, the first man who tried to snap his picture would get. Mr. Geraghty is usually a peaceful, law-abiding citizen, but there arrived here to-day a number of men to get his picture, and he seriously resents being followed." Press dispatch of August 12, 1911, quoted in Wigmore, Cases on Torts, II, 960–961. *Cf.* Binns *v.* The Vitagraph Co., 210 N. Y. 51, 103 N. E. 1108 (1913).

limbs.[65] The actions that protect the latter from injury may well be made to protect the former by the ordinary process of legal growth. The problems are rather to devise suitable redress and to limit the right in view of other interests involved.

The interest in body and life is not only the first to receive the protection of law, but it is on the whole the interest with respect to which individual demands are most insistent and the social interest in securing them is strongest. Yet the law, as has been seen, does not cover the whole field of this interest. It does not secure all the demands with respect to physical and mental integrity which the individual may make. The reasons are of two kinds. On the one hand they are historical, growing out of the mode in which the law upon this subject has developed, and in particular out of the procedure and the remedies worked out to give effect thereto. For example, a large part of the backwardness of the common law as to immunity of the mind and of the nervous system from injury is due to the exigencies of our mode of trial by jury and to our remedy of damages. Such a remedy as that afforded by the action for honorable amends[66] in the civil law and resort to specific relief where possible, as is done in continental Europe,[67] would enable the legal system to extend the scope of its protection of this interest. But the most effective remedy in this connection is prevention. The backwardness of preventive justice in American law is a grave defect.[68] In connection with interests of personality, where redress by way of damages is often obviously inadequate if not inapplicable, the hesitation of our law to apply preventive remedies is unfortunate and without just excuse.[69]

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[65] Some think of the right of privacy as a "property right," that is, they consider that an interest of substance is involved. Munden *v.* Harris, 153 Mo. App. 652, 134 S. W. 1076 (1911). But see Riddle *v.* MacFadden, 201 N. Y. 215, 94 N. E. 644 (1911).

[66] See De Villiers, The Roman and Roman Dutch Law of Injuries, 177 ff.

[67] Garraud, Droit pénal français, II, §§ 459–461; IV, §§ 1324 ff.

[68] See my paper, A Practical Program of Procedural Reform, 22 Green Bag 455.

[69] "There is no reason in the nature of things why equity should not interfere to prevent injury to feelings. Pecuniary damages cannot be proved, and the temptation to purely speculative litigation is therefore absent. Such being the case, if a plaintiff feels himself so much aggrieved by threatened or continued acts of the defendant as to lead him to incur the expense and annoyance of an actual litigation, we may be certain that he regards the injury as substantial. If under these circumstances he

A second type of reasons for the failure of the law to secure fully individual interests of personality are practical, growing out of the practical limitations involved in the administration of justice according to law. Next to property in corporeal things, the interest in body and life is on the whole the interest most completely capable of legal protection. But the practical limitations are considerable. In the first place, with respect to merely mental injuries, the danger of imposture, the difficulty, if not impossibility, of satisfactory proof, and the difficulty of devising adequate redress stand in the way of complete securing by law of an interest which the law is quite willing to recognize fully. Again, account must be taken of the relative triviality of injuries, looked at in gross, which may nevertheless have a real importance in the case of particular individuals. The necessity of acting with reference to the average case, involved in any system of standards or rules, compels some sacrifice of the demands of the over-sensitive. Finally, the intangible nature of many injuries to personality, the difficulty of tracing them to their source and of fitting cause to effect, must also be taken into account.

[*To be concluded*]

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can, in fact, prove that continued injury to his feelings is threatened or continued, and the defendant can offer no rational excuse for continuing it, equity has no rational excuse to offer for denying the easy aid of its injunctive process." Abbot, Justice and the Modern Law, 32.